EX PARTE OR LATE FILED

ORIGINAL

UNITED STATES DEPARTMENT OF COMMERCE
National Telecommunications and Information Administration
Washington, D.C. 20230

April 14, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Comments in Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, CC Dkt. No. 96-45

Dear Ms. Salas:

Enclosed please find one original and two of the ex parte Comments of the National Telecommunications and Information Administration in the above-referenced proceeding. A copy was hand-delivered to Chairman Kennard and each of the Commissioners. The comments were also delivered in electronic form on a diskette in WordPerfect 5.1 to Sheryl Todd in the Accounting Policy Division of the Common Carrier Bureau and to the Commission's copy contractor, International Transcription Service.

Please direct any questions you may have regarding this filing to the undersigned. Thank you for your cooperation.

Respectfully submitted,

Kathy Smith
Chief Counsel

cc: The Honorable William E. Kennard
The Honorable Harold Furchtgott-Roth
The Honorable Susan Ness
The Honorable Michael Powell
The Honorable Gloria Tristani
Sheryl Todd, Common Carrier Bureau
International Transcription Service

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	
Universal Service: Promoting	)	CC Docket No. 96-45
Deployment and Subscribership in	)	
Unserved and Underserved Areas,	)	
Including Tribal and Insular Areas	)	

EX PARTE COMMENTS OF THE
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

Gregory L. Rohde
Assistant Secretary for
Communications & Information

Kelly Levy
Associate Administrator
Tim Sloan
Office of Policy Analysis
and Development

Kathy Smith
Chief Counsel

Milton Brown
Deputy Chief Counsel

National Telecommunications
and Information Administration

U.S. Department of Commerce
Room 4713
14th Street and Constitution Ave., N.W.
Washington, D.C. 20230
(202) 482-1816

April 14, 2000

TABLE OF CONTENTS

Section		Page
Summary		i
I.	INTRODUCTION AND SUMMARY OF POSITION	2
II.	DESIGNATION OF ETCs	6
	A. Requirement that ETCs "Offer" the Federally-Defined Universal Service Package Throughout Their Designated Service Areas	7
	B. State Commissions' Authority To Specify Additional Eligibility Requirements for ETCs	9
	C. Commission's Authority To Designate as ETCs Carriers "Not Subject to the Jurisdiction of a State "Commission"	12
III.	ADOPTION OF A "NO DISCONNECT" POLICY	17
IV.	CONCLUSION	23

SUMMARY

NTIA applauds the Commission's efforts to increase telecommunications deployment and subscribership in unserved and underserved regions of the country, particularly on tribal lands and insular areas. We also support the fundamental objectives of the *Further Notice* -- to ensure that basic telecommunications service is available and affordable to all who desire it. We also believe that the Commission should adopt rules and policies to advance the broader goal of assuring the timely deployment of advanced telecommunications services and facilities throughout the Nation.

The Commission can increase the affordability of basic telephone service (and, thus, increase subscribership in areas where penetration currently lags behind the national average) by adopting many of the changes to its existing universal service policies outlined in the *Further Notice*. In particular, the Commission should modify its Lifeline program to ensure that Native Americans can receive the Federal support funding they may need to preserve their access to basic telephone service. For example, the Commission should alter the eligibility criteria for receiving Lifeline support so that they include assistance programs targeted to Native Americans living on tribal lands. It should also work with the appropriate Federal and State agencies to acquaint Native Americans with the Federal low-income program and the steps they must take to qualify it for Lifeline support.

The Commission should further promote telephone subscribership by prohibiting carriers from disconnecting a customer's local service for nonpayment of interstate long distance charges. There appears to be no bar to the Commission's imposition of such a

requirement on carriers not subject to State jurisdiction. Furthermore, the Commission can offer a rationale for a more general "no disconnect" policy that is fully consistent with the Fifth Circuit's holding in *Texas Office of Public Utility Counsel v. FCC.*

NTIA also believes that the Commission can increase both subscribership and facilities/service deployment by preserving opportunities for competitive entry in all areas of the country. For competition to develop in areas where, under most circumstances, the incumbent providers already receive substantial government universal service subsidies, new entrants must have access to those subsidies as well. In practice, that means that entrants must secure designation as "eligible telecommunications carriers" (ETC) which, under the Communications Act (Act), is a precondition to receiving support monies from the Federal universal service fund.

Although section 214(e) of the Act ostensibly establishes the prerequisites and procedures for designating ETCs, the statutory language is not definitive as to the nature and scope of those requirements or the roles and powers of Federal and State regulators in implementing them. NTIA therefore urges the Commission to construe the governing provisions of section 214(e), to delimit the authority of State commissions to expand those requirements, and to specify the responsibilities of Federal and State regulators in designating ETCs. Specifically, the Commission should (1) declare that a carrier need not be already providing service in order to secure designation as an ETC, (2) bar State commissions from establishing additional eligibility requirements for ETC designation that conflict with other

provisions of the Act, and (3) clarify the procedures and standards for implementing section 214(e)(6), which instructs the Commission to dispose of designation requests from carriers not subject to State jurisdiction. If these actions result in an increase in the number of carriers designated as ETCs, the Commission should ensure that all designated ETCs receive sufficient universal service support and that it does not constrain existing levels of support.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	
Universal Service: Promoting	)	CC Docket No. 96-45
Deployment and Subscribership in	)	
Unserved and Underserved Areas,	)	
Including Tribal and Insular Areas	)	

EX PARTE COMMENTS OF THE
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

The National Telecommunications and Information Administration (NTIA), an Executive Branch agency within the Department of Commerce, is the President's principal advisor on domestic and international telecommunications and information policy. NTIA respectfully comments on the Commission's Further Notice of Proposed Rulemaking (*Further Notice*) in the above-captioned proceeding.[1/]

1/ Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, *Further Notice of Proposed Rulemaking*, 14 FCC Rcd 21177 (1999) (*Further Notice*). Unless otherwise indicated, all subsequent citations to "Comments" and "Reply Comments" shall refer to pleadings filed on December 17, 1999 and January 19, 2000, respectively, in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY OF POSITION

In furtherance of its statutory obligation to ensure that quality telecommunications services are available to all Americans, the Commission issued the *Further Notice* to explore ways to increase telecommunications deployment and subscribership in unserved and underserved regions of the country, particularly on tribal lands and insular areas. NTIA applauds the Commission's initiative in this area and supports the fundamental objectives of the *Further Notice* -- to ensure that basic telecommunications service is available and affordable to all who desire it. We also believe that the Commission should adopt rules and policies to advance the broader goal of assuring the timely deployment of advanced telecommunications services and facilities throughout the Nation.

The Commission can increase the affordability of basic telephone service (and, thus, increase subscribership in areas where penetration currently lags behind the national average) by adopting many of the changes to its existing universal service policies outlined in the *Further Notice*.[2/] In particular, the Commission should modify its Lifeline program to ensure that Native Americans can receive the Federal support funding they may need to preserve

---

2/ These proposed changes include (1) revising its Lifeline program to entitle or make it easier for certain carriers to receive additional tiers of Lifeline support, *id.* at 21206-21208, ¶¶ 68-70, (2) modifying the LinkUp America program to provide additional support for qualified households to offset line extension and construction costs in areas where telephone penetration is substantially below the national average, *id.* at 21226-21227, ¶¶ 119-121, and (3) permitting carriers to treat tribal lands within a State as a separate study area for determining Federal high cost support, *id.* at 21204-21205, ¶¶ 63-65. If adoption of the last proposal increases the number of carriers eligible for Federal high cost support, the Commission should ensure that all designated ETCs receive sufficient universal service funding and that it does not constrain existing levels of support. *See id.* at 21206, ¶ 67.

their access to basic telephone service. For example, the Commission should alter the eligibility criteria for receiving Lifeline support so that they include assistance programs targeted to Native Americans living on tribal lands.[3/] It should also work with the appropriate Federal and State agencies to acquaint Native Americans with the Federal low-income program and the steps they must take to qualify for Lifeline support.

The Commission should further promote telephone subscribership by prohibiting carriers from disconnecting a customer's local service for nonpayment of interstate long distance charges. There appears to be no bar to the Commission's imposition of such a requirement on carriers not subject to State jurisdiction. And, as discussed below, the Commission can offer a rationale for a more general "no disconnect" policy that is fully consistent with the Fifth Circuit's holding in *Texas Office of Public Utility Counsel v. FCC (TOPUC)*.[4/]

NTIA also believes that the Commission can increase both subscribership and facilities/service deployment by preserving opportunities for competitive entry in all areas of the country. For competition to develop in areas where, under most circumstances, the incumbent providers already receive substantial government universal service subsidies, new entrants must have access to those subsidies as well. In practice, that means that entrants must secure designation as "eligible telecommunications carriers" (ETC) which, under the

---

3/ *See id.* at 21208, ¶ 71.

4/ 183 F.3d 393 (5th Cir. 1999).

Communications Act (Act), is a precondition to receiving support monies from the Federal universal service fund.[5/]

Although section 214(e) of the Act ostensibly establishes the prerequisites and procedures for designating ETCs, the statutory language is not definitive as to the nature and scope of those requirements or the roles and powers of Federal and State regulators in implementing them.[6/] The ambiguities in the text have been exacerbated by the *TOPUC* court's holding that State commissions may establish criteria for ETC designation in addition to those enumerated in section 214(e)(1), without specifying the extent of that discretion.[7/]

5/ *See* 47 U.S.C. § 254(e) (Supp. III 1997) (specifying that only ETCs may receive Federal universal service report).

6/ *See, e.g., Further Notice*, 14 FCC Rcd at 21209-21214, ¶¶ 73-82 (soliciting comments on the interpretation and application of section 214(e)(6), which authorizes the Commission to issue an ETC designation "[i]n the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission"); *Western Wireless Corp. Petition for Designation as an Eligible Telecommunications Carrier to Provide Services Eligible for Universal Services Support in Wyoming*, CC Docket No. 96-45, DA 99-2511 (rel. Nov. 22, 1999) (whether Commission may designate a wireless carrier as an ETC pursuant to section 214(e)(6) of the Act in the wake of State commission decision that it lacked jurisdiction over the carrier); *Western Wireless Corp. Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket No. 96-45, DA 99-1356 (rel. July 19, 1999) (requesting Commission preemption of a State commission's refusal to designate wireless carrier as an ETC based on an allegedly erroneous interpretation and application of section 214(e)). Because some of NTIA's comments herein are applicable to the two Western Wireless petitions, we respectfully request that the Commission include this pleading in the record of those proceedings.

7/ *TOPUC*, 183 F.3d at 417-418. The court suggested only that State commissions ought to be allowed to prescribe service quality standards for prospective ETCs. *Id.* at 418. But the court did not need to reject the Commission's reading of section 214(e) (*i.e.*, that State commissions may not establish eligibility criteria for ETCs beyond those specified in section 214(e)(1)) in order to safeguard State commission's right to adopt service quality standards.

(continued...)

NTIA therefore urges the Commission to construe the governing provisions of section 214(e), to delimit the authority of State commissions to expand those requirements, and to specify the responsibilities of Federal and State regulators in designating ETCs.[8/] Specifically, the Commission should (1) declare that a carrier need not be already providing service in order to secure designation as an ETC, (2) bar State commissions from establishing additional eligibility requirements for ETC designation that conflict with other provisions of the Act, and (3) clarify the procedures and standards for implementing section 214(e)(6), which instructs the Commission to dispose of designation requests from carriers not subject to State jurisdiction. If these actions result in an increase in the number of carriers designated as ETCs, the Commission should ensure that all designated ETCs receive sufficient universal service support and that it does not constrain existing levels of support.

7/ (...continued from preceding page)
The Commission's definition of the Federal universal service package, which carriers must offer in order to secure ETC designation, explicitly authorizes State commissions to "adopt and enforce service quality standards that are competitively neutral, . . . and that are not otherwise inconsistent with" Federal universal service requirements. Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd 8776, 8833, ¶ 101 (1997) (*Universal Service Order*).

8/ Congress's decision to empower State commissions to designate ETCs does not, *ipso facto*, divest the Commission of its authority to construe the provisions in the Communications Act that govern the States' deliberations. *Cf. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 385 (1999) (sections of the Act directing State commissions to establish rates for interconnection, network elements and resale, to exempt certain rural carriers from the Act's interconnection requirements, and to approve interconnection agreements "do not logically preclude the Commission's issuance of rules to guide the state-commission judgments").

II. DESIGNATION OF ETCs

Under most circumstances, section 214(e) charges State commissions with the task of designating ETCs.[9/] Section 214(e)(6), however, directs the Commission to act upon designation requests from "common carrier[s] providing telephone exchange service and exchange access that [are] not subject to the jurisdiction of a State commission."[10/] Furthermore, section 214(e) establishes several minimum requirements that all ETCs must satisfy and outlines the standards that State commissions must follow when deciding whether to designate multiple ETCs for particular service areas.[11/] As the expert administrative agency responsible for the implementation and enforcement of the Act, the Commission should offer its construction of the statute so that those congressionally mandated requirements and standards are applied consistently throughout the country. Discussed below are several areas where the need for Commission action is particularly pressing.

NTIA recognizes that if the Commission adopts the recommendations outlined below, the Commission must ensure that all designated ETCs receive sufficient universal service support and that it does not constrain existing levels of support, in order to avoid any increased pressure on local telephone rates.

9/ *See* 47 U.S.C. § 214(e)(2) (Supp. III 1997) (State commission shall "designate a common carrier that meets the requirements of paragraph [214(e)](1) as an eligible telecommunications carrier for a service area designated by the State commission"). *See also Further Notice*, 14 FCC Rcd at 21209-21210, ¶¶ 74-75.

10/ 47 U.S.C. § 214(e)(6) (Supp. III 1997).

11/ *Id.* § 214(e)(1), (2).

A. Requirement that ETCs "Offer" the Federally-Defined Universal Service Package Throughout Their Designated Service Areas

Section 214(e)(2) specifies that State commissions may only designate as ETCs common carriers that meet the requirements of section 214(e)(1). The latter provision provides, among other things, that an ETC shall "offer" the package of services defined by the Commission pursuant to section 254(c) "throughout the service area for which the designation is received."[12/] In a decision declining to designate Western Wireless as an ETC, the South Dakota Public Utilities Commission read that language to require that a carrier "must be *actually* offering or providing the services supported by the Federal universal service support mechanisms throughout the service area *before* being designated as an ETC."[13/]

The Commission should reject the State commission's interpretation of section 214(e)(1). That construction is certainly not compelled by the statutory text. Although section 214(e)(1) indicates what services an ETC must "offer" and where, it does not specify *when* those services must be provided. Although the language can be read to require provision of service prior to ETC designation, it can just as easily support a Commission determination that the required services need not be offered until afterwards.

12/ 47 U.S.C. § 214(e)(1)(A).

13/ Filing by GCC License Corp. for Designation as an Eligible Telecommunications Carrier, *Findings of Fact and Conclusions of Law; Notice of Entry of Order*, TC 98-146, at 5-6, Conclusions of Law ¶ 6 (S.D. Pub. Utils. Comm'n May 19, 1999) (emphasis added).

NTIA also submits that the construction adopted by the South Dakota PUC is inconsistent with the procompetitive purposes of the Telecommunications Act of 1996, which added section 214(e) to the Communications Act. If a carrier must begin offering service before receiving ETC designation, it will be forced to incur the considerable expense and risk to deploy the infrastructure to compete with an established incumbent throughout a particular service area, without any assurance that the carrier will receive the universal service subsidies that it will likely need to compete and that, in most instances, the incumbent is already receiving.[14/] Few, if any firms, would opt to enter a new market under those conditions. Thus, a requirement to offer service before designation would tend to erect a substantial barrier to competitive entry in many areas, contrary to the 1996 Act's expressed intent to "open[] all telecommunications markets to competition."[15/]

For these reasons, NTIA urges the Commission to declare that a carrier can satisfy the "offer" requirement of section 214(a)(1) by demonstrating its ability to provide the required services after designation.[16/] To deter new entrants from filing premature or frivolous

---

14/ *See* Reply Comments of the Washington Utilities and Transportation Commission at 3-4, CC Docket No. 96-45, DA 99-1356 (filed Sep. 17, 1999); Petition for Preemption of Western Wireless Corp. at 3, 8-9, CC Docket No. 96-45, DA 99-1356 (filed June 23, 1999).

15/ H. Conf. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124 (*Conference Report*).

16/ Thus, the Commission should grant Western Wireless' petition and return the matter to the South Dakota PUC for further proceedings consistent with the Commission's interpretation of section 214(e)(1). The Commission should, however, express an intent to defer to the State commission's factual findings as to Western Wireless' ability and willingness to satisfy the applicable legal standard, if the State commission gives interested parties ample opportunity to present their cases and conducts a careful analysis of the facts

(continued...)

designation requests, however, the Commission should require that an applicant be capable of providing the required service within a reasonable time after receiving ETC designation.[17/] NTIA understands that allowing carriers to obtain ETC designation upon a credible commitment to provide service post-designation may create some potential for abuse. We think that possibility is mitigated substantially by the Commission's conclusion that "a carrier is not automatically entitled to receive universal service support once designated," but will receive funding only if it "succeeds in attracting and/or maintaining a customer base to whom it provides universal service."[18/]

B. State Commissions' Authority To Specify Additional Eligibility Requirements for ETCs

In its *Universal Service Order*, the Commission concluded that section 214(e)(2) of the Act does not permit Federal or State regulators to establish eligibility criteria for ETCs in addition to those specified in section 214(e)(1).[19/] On appeal, the *TOPUC* court held that section 214(e)(2) speaks only to how many ETCs a State commission must designate, and contains "nothing . . . [that] prohibits the states from imposing their own eligibility

---

16/ (...continued from preceding page)
presented. *Cf. University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986) (when State agency resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, Federal courts should give the agency's fact-finding the same preclusive effect to which it would be entitled in the State's courts).

17/ *See, e.g.*, Comments of the South Dakota Independent Telephone Coalition, Inc. at 6, CC Docket No. 96-45, DA 99-1356 (filed Sep. 1, 1999) (SDITC Comments).

18/ *Universal Service Order*, 12 FCC Rcd at 8853-8854, ¶¶ 137, 138.

19/ *Id.* at 8851-8853, ¶¶ 135-137.

requirements."[20/] Some parties read the court's opinion to mean that State commission's discretion in this area is virtually unfettered.[21/]

20/ *TOPUC*, 183 F.3d at 418. The court's holding is difficult to square with the text or its legislative history. Whatever section 214(e)(2) says on the question of how many ETCs must be designated, it makes clear that all designated ETCs must meet the requirements of section 214(e)(1). 47 U.S.C. § 214(e)(2) (Supp. III 1997) (State commission "shall . . . designate a common carrier that meets the requirements of paragraph (1) as an [ETC]"; State commission may designate more than one ETC for a particular service area "so long as each additional requesting carrier meets the requirements of paragraph (1)").

Section 214(e)(1), in turn, specifies only three such requirements: (1) "offering" the universal service package throughout the defined service area; (2) either using the carrier's own facilities or a combination of its own facilities and resold services of another carrier; and (3) advertising the availability of its services and the charges therefor. It nowhere authorizes State commissions to create additional eligibility criteria. This omission is significant because, in other contemporaneously-enacted provisions of the Act, when Congress intended to authorize States to prescribe standards and requirements over and above those appearing in the statute, Congress included language specifically granting that authority. *See, e.g., id.* §§ 251(d)(3) (preserving State discretion to establish access and interconnection obligations in addition to those identified in section 251(c)), 254(f) (permitting States to adopt definitions and standards to preserve and advance universal service not inconsistent with measures adopted by the Commission).

The absence of statutory language explicitly authorizing States to establish additional ETC eligibility requirements creates an inference that (at least in areas not served by rural telephone companies) State commissions were expected to designate as ETC all requesting carriers that satisfy the criteria set forth in section 214(e)(1). That supposition is confirmed by the accompanying conference report: "If more than one common carrier that meets the requirements of new section 214(e)(1) requests designation as an [ETC] in a particular area, the State Commission shall, in the case of areas not served by a rural telephone company, designate *all such carriers* as eligible." *Conference Report, supra* note 15, at 141, 1996 U.S.C.C.A.N. at 153 (emphasis added).

21/ *See, e.g.*, Reply Comments of U S West Communications, Inc. at 6 ("whether or not the Commission agrees with them," State commissions can mandate such ETC eligibility requirements "as a current universal service offering, affordability, unbundling, quality, landline substitutability and public interest in all (rural and non-rural areas)"); SDITC Comments, *supra* note 17, at 35 (court decision "eliminates any possibility of finding a conflict between" State commission decisions and section 214(e)(1)).

That cannot be the case, however. Even assuming that Congress authorized State commissions to mandate additional eligibility criteria for ETCs, which is at best arguable, there is no evidence that, by so doing, Congress gave State commissions *carte blanche* to override other provisions of the Act. To hold otherwise would seem to conflict with the framework of the Act, in which Congress generally limited States' discretion to impose obligations and requirements beyond those specified in the Act.[22/] Section 251 of the Act, for example, identifies three distinct categories of telecommunications service providers -- "telecommunications carriers," "local exchange carriers" (LECs), and "incumbent local exchange carriers" (ILECs) -- and imposes different duties and obligations on each group.[23/] In the absence of compelling evidence to the contrary -- of which there is none -- one simply cannot conclude that Congress intended for State commissions' power to designate ETCs to carry with it discretion to ignore the structure of section 251 and, for instance, require a "telecommunications carrier" to assume the obligations of a LEC or an ILEC in order to qualify as an ETC.[24/] The Commission should so hold.

Similarly, section 332(c)(3) of the Act generally bars State and local entry and rate regulation of commercial mobile radio service (CMRS) providers.[25/] Again, there is no evidence that Congress meant for the States' power to designate ETCs under section 214(e) to

---

22/ *See* note 20 *supra*.

23/ *See* 47 U.S.C. § 251(a)-(c) (Supp. III 1997).

24/ *See, e.g.*, Opposition of the Coalition of Rural Telephone Companies at 42-43, CC Docket No. 96-45, DA-1356 (filed Sep. 2, 1999).

25/ 47 U.S.C. § 332(c)(3)(A) (Supp. III 1997).

include a right to nullify the deregulatory provisions of section 332(c)(3). The Commission should therefore rule that State commissions may not require CMRS providers to submit to entry and\or rate regulation in order to be designated as an ETC, except as specifically permitted by the Act.

C. Commission's Authority To Designate as ETCs Carriers "Not Subject to the Jurisdiction of a State "Commission"

Section 214(e)(6) of the Act indicates that "[i]n the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission," the Commission must act upon designation requests by that carrier. The provision was the subject of considerable debate among commenters in this proceeding. Some parties insist that the language was intended to apply only to tribal-owned carriers serving tribal lands.[26/] Other parties contend that section 214(e)(6) empowers the Commission to designate as ETCs any carrier providing service on tribal lands.[27/] In the *Further Notice*, the Commission queried whether the language gives it, rather than State commissions, jurisdiction to designate terrestrial wireless or satellite carriers as ETCs, wherever they serve.[28/]

26/ *See, e.g.,* Reply Comments of NRTA and OPASTCO at 11-12; Comments of the Western Alliance at 3-7.

27/ *See, e.g.*, Reply Comments of United State Cellular Corp. at 6-7 (Jan. 20, 2000); Comments of Smith Bagley, Inc. at 5.

28/ *Further Notice*, 14 FCC Rcd at 21211, ¶ 77.

NTIA believes that section 214(e)(6) cannot be read to cover only tribally-owned carriers serving tribal lands. The statutory text is not so confining, and Congress easily could have crafted limiting language if that had been its intent. The legislative history also does not support restricting section 214(e)(6) to tribal-owned entities. The author of the provision, Senator McCain, argued that the amendment was necessary because, as enacted in 1996,

> Section 214(e) [did] not account for the fact that State commissions in a few States have no jurisdiction over certain carriers. Typically States *also* have no jurisdiction over tribally owned common carriers which may or may not be regulated by a tribal authority that is not a State commission per se.[29/]

Proponents of the amendment in the House of Representatives took a similar view of its scope and purpose -- to modify the State-centered process for designating ETCs to reflect the fact that "some common carriers providing service today are not subject to the jurisdiction of a State commission; *most notably* some carriers owned or controlled by native Americans."[30/] The language legislators used to describe section 214(e)(6) confirms that although the class of carriers to be covered by section 214(e)(6) was perhaps dominated by tribally-owned entities, it was not restricted to them.

29/ 143 Cong. Rec. S12568 (daily ed. Nov. 13, 1997) (emphasis added).

30/ *Id.* at H10807-H10808 (daily ed. Nov. 13, 1997) (statement of Rep. Bliley) (emphasis added). *See also id.* at H10808 (statement of Rep. Markey) (bill allows Commission to designate as ETC "common carrier that is not subject to the jurisdiction of a State commission, *including* those telephone companies owned by certain federally-recognized Indian tribes") (emphasis added); *id.* at H10808 (statement of Rep. Hayworth) (existing section 214(e) "has created a serious problem for certain telecom carriers, *particularly* some Indian tribes") (emphasis added).

On the other hand, the amendment was not meant to exempt a large number of carriers from the State-centered ETC designation process established in section 214(e). Supporters of the amendment uniformly characterized the provision as a "technical correction" that would apply only to a "limited" number of carriers.[31/] There is, in short, nothing in the statute or the legislative history to support the notion that, by enacting section 214(e)(6), Congress intended to remove the designation of wireless or satellite carriers as ETCs entirely from the States to the Commission.

Nor can one easily read that provision as giving the Commission ETC designation authority over non-tribally owned carriers serving tribal lands, as many wireless carriers advocate. During the debate on section 214(e)(6), Congress acknowledged then-pending jurisdictional dispute between States and tribal governments, including, presumably, questions of State authority over tribal-owned entities serving non-tribal lands or non-tribal-owned entities operating in tribal lands. The legislators then emphasized that the amendment was not intended to resolve those issues one way or the other.[32/]

31/ *See, e.g., id.* at H10809 (statement of Rep. Tauzin) ("technical correction"); *id.* at H10808 (statement of Rep. Markey) (same); *id.* at H10808 (statement of Rep. Hayworth) (bill corrects "technical glitch" in section 214(e)); *id.* at H10808 (statement of Rep. Bliley) (bill "will apply to only a limited number of carriers"); *id.* at S12568 (statement of Sen. McCain) (amendment will correct an "oversight" in the 1996 Act).

32/ *See, e.g., id.* at H10808-H10809 (colloquy between Rep. Bliley and Rep. Thune); *id.* at S12568 (colloquy between Sen. McCain and Sen. Daschle).

Thus, the better reading of section 214(e)(6) is that it does not significantly alter the basic structure of section 214(e), which gives State commissions the principal role in designating ETCs. Rather, the amendment addresses a relatively limited number of instances in which, for one reason or another, the relevant State commission lacks jurisdiction over a particular carrier and creates an alternative mechanism by which that carrier can obtain ETC designation from the Commission and thereby preserve the carrier's access to the support monies it may need to provide adequate, affordable service to its customers.

The remaining question concerns the procedures to be followed in practice to determine where jurisdiction lies. Given the nature of the underlying interests, and in view of the Act's State-centered process for designating ETCs, NTIA believes that in most instances the jurisdictional issues should be considered by the appropriate State commission.[33/] The typical case -- *e.g.*, whether the State commission has jurisdiction over a wireless providers, or a non-tribal-owned firm seeking to provide service on tribal lands -- will likely involve an amalgam of particularized facts, state statutory law, state case law, and Federal Indian law that lies outside the bounds of the Commission expertise. Under those circumstances, the better approach (and, certainly, the best use of the Commission's limited resources) would be

---

33/ The Commission should not assume that, in enacting section 214(e)(6), Congress intended to give the Commission primary designation authority even for tribally-owned carriers. The debates over the provision indicate Congress' understanding that the "glitch" it sought to fix occurred only "in a few instances," involved "[s]ome, not all" States, and affected "only a limited number of carriers." *See id.* at H10808 (daily ed. Nov. 13, 1997) (statements of Reps. Markey, Hayworth, and Bliley, respectively). Thus, many cases involving tribally-owned carriers seeking ETC designation will involve non-Federal jurisdictional claims and issues that will more appropriately litigated at the State level.

for the Commission to allow the State commission to handle the matter. On the other hand, if a State commission determines that it lacks jurisdiction over a particular carrier, as the Wyoming Public Service Commission recently held with respect to Western Wireless, the Commission should defer to that decision and consider expeditiously any request for designation by the affected carrier pursuant to section 214(e)(6).[34/]

Section 214(e)(6) indicates that, when the Commission exercises its authority to designate as ETCs carriers not subject to State commissions, it must follow the same guidelines that section 214(e)(2) prescribes for State commissions. Most importantly, the Commission must conduct a thorough and searching fact-finding review of each ETC application that properly comes before it to ensure that the requesting carrier demonstrates its ability and willingness to satisfy the requirements of section 214(e)(1) within a reasonable time after designation. For ETC applications seeking to serve tribal lands, moreover, the Commission should consult closely with the relevant tribal authorities and interests before acting upon each request.[35/]

In areas served by a rural telephone company (which likely include most tribal lands), the Commission may not designate additional ETCs unless it first finds that the public interest

---

34/ *See* Application of Western Wireless for Authority to be Designated as an Eligible Telecommunications Carrier, *Order Granting Motion to Dismiss Amended Application*, Docket No. 70042-TA-98-1, Record No. 4432 (Wyoming Pub. Serv. Comm'n Aug. 13, 1999).

35/ *See, e.g.*, Reply Comments of the Cheyenne River Sioux Tribe Telephone Authority at 2-3 (filed Jan. 21, 2000); Reply Comments of the Miami Tribe of Oklahoma at 2 (filed Jan. 19, 2000); Comments of Gila River Telecommunications, Inc. at 7 (filed Dec. 17, 1999).

would be served thereby. NTIA believes that increased competition benefits consumers and furthers universal service goals, yet the Commission must also consider a number of other factors in less populated areas to ensure that designation of additional ETCs will serve the public interest. Such factors include the new carrier's effect on the existing level and quality of service within the designated service area, and the new ETC's ability to upgrade its network to make it capable of providing advanced services.

III. ADOPTION OF A "NO DISCONNECT" POLICY

Many of the specific proposals in the *Further Notice*, notably changes in the Lifeline and LinkUp America programs, seek to increase telephone subscribership in underserved areas by reducing the installation or monthly subscription rate for telephone service. The Commission recognizes, however, that low penetration in some households may also be attributable to excessive monthly usage charges.[36/] It therefore requests comment on two approaches to making telephone usage more affordable for low-income households in remote areas and on tribal lands -- expanding local calling areas to reduce the number of calls subject to toll charges and providing Federal universal support for some amount of monthly long distance calling.[37/]

NTIA does not believe the Commission should adopt either proposal at this time. As some commenters point out, the Commission arguably lacks jurisdiction to change carriers'

36/ *See Further Notice*, 14 FCC Rcd at 21192, 21227-21228, ¶¶ 30, 122-124.

37/ *See id.* at 21227-21228, ¶¶ 122-123.

local calling areas.[38/] Even if the Commission had such authority, expanding local calling areas for the benefit of some households would likely increase pressures on the rates paid by other customers, potentially undermining universal service goals.[39/] Subsidizing some level of toll calling by low-income households could significantly increase the size of the Federal universal service fund, to the detriment of the carriers who must contribute to that fund and their customers.[40/]

As an alternative to the proposals outlined in the *Further Notice*, NTIA recommends that the Commission adopt a rule barring carriers from disconnecting local service for nonpayment of interstate long distance charges. The Commission has already found that a "no disconnect" policy could benefit telephone penetration by protecting those customers who fall off the network because they cannot manage their long distance usage.[41/] NTIA believes that the Commission has jurisdiction to promulgate such a policy, as demonstrated below. Its imposition, moreover, would not necessitate any increases in local service rates or in existing levels of universal service funding.

38/ *See, e.g.*, Reply Comments of Bell Atlantic at 4; Reply Comments of GCI at 4.

39/ *See id.*

40/ *See* Reply Comments of Bell Atlantic at 4-5.

41/ *See Universal Service Order*, 12 FCC Rcd at 8853, ¶ 390. *See also* Reply Comments of the National Telecommunications and Information Administration at 10-17, CC Docket No. 95-115 (filed Mar. 29, 1996).

NTIA recognizes that the *TOPUC* court overturned a Commission-mandated no disconnect policy, on the grounds that it unlawfully impinged on State commissions' authority under section 2(b) of the Act to regulate intrastate service rates.[42/] The court did not rule, however, that the Commission could *never* justify a no disconnect policy; it simply concluded that the rationales the Commission offered in support of its action were not persuasive. The court's decision thus does not preclude the Commission from reimposing such a policy with a different justification.

The court determined that in order to defend a no disconnect policy (and its necessary preemption of State action to the contrary), the Commission had to show that

> (1) the matter to be regulated [*i.e.*, disconnection of service for nonpayment of long distance charges] has both interstate and intrastate aspects; (2) FCC preemption is necessary to protect a valid Federal regulatory objective; and (3) state regulation would negate the exercise by the FCC of its own lawful authority because regulation of the interstate aspects of the matter cannot be unbundled from regulation of intrastate aspects.[43/]

42/ *See TOPUC*, 183 F.3d at 421-424. To the extent that the Commission imposes a no disconnect obligation on carriers not subject to State jurisdiction, however, section 2(b) is not implicated and, thus, the court's ruling is no bar to Commission action.

43/ *Id.* at 422 (quoting *Public Serv. Comm'n of Maryland v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990) (*Maryland PSC*)). The first condition is plainly satisfied in these circumstances because, as the *Maryland PSC* court noted, it is well-established "that services provided locally by the [local exchange carriers] which support access to the interstate communications network have interstate as well as interstate aspects." *Maryland PSC*, 909 F.2d at 1515 (citations omitted).

The court accepted the Commission's "brief explanation" of the Federal interests to be protected -- increasing telephone subscribership and improving competition for interstate billing and collection services -- but concluded, albeit without much discussion, that the Commission did not adequately explain how State control of service disconnection would negate those Federal interests or why their protection required imposition of a no disconnect rule.[44/]

In NTIA's view, there are profound interstate interests to be served by a no disconnect policy that were not proffered by the Commission or considered by the court. First, disconnection terminates a subscribers' access to emergency services, such a 911 service, which are a part of the Federally-defined universal service package and which are "widely recognized as essential to . . . public safety."[45/] Second, a no disconnect policy furthers a Federal interest in preserving a subscriber's access to interstate long distance services, if only to receive long distance calls.[46/] Section 2(a) of the Act gives the Commission exclusive jurisdiction over interstate communications.[47/] Section 254(b) of the Act, moreover, lists among the principles that the Commission must follow in crafting policies to preserve and

---

44/ *TOPUC*, 183 F.3d at 422.

45/ *Universal Service Order*, 12 FCC Rcd at 8815, ¶ 72 (quoting Federal-State Joint Board on Universal Service, *Recommended Decision*, 12 FCC Rcd 87, 114 (1996)).

46/ As the Commission knows, there are a number of ways to preclude a subscriber who fails to pay his or her long distance bill from *making* additional interstate calls. *See, e.g., Universal Service Order*, 12 FCC Rcd at 8979-8983, ¶¶ 384-389 (discussing toll-blocking and toll-limitation alternatives). Thus, there are ways to protect long distance carriers and penalize delinquent users that do not entail the drastic step of terminating local service.

47/ 47 U.S.C. § 152(a) (1994).

advance universal service ensuring access to interexchange services by "[c]onsumers in all regions of the Nation."[48/] As the Commission has pointed out, "access" in this case includes not only the ability to make long distance calls, but to receive them as well.[49/]

The remaining question is whether a State regulation of service disconnection would "negate" the Commission's ability to protect these important Federal interests or whether the interstate aspects of service disconnection can be "unbundled" from the intrastate aspects. Obviously, the interstate and intrastate effects of service disconnection cannot be untangled because disconnection of local service necessarily terminates long distance service and precludes the customer from making 911 or E911 calls.[50/] As a result, allowing States to permit carriers to disconnect local service for nonpayment of interstate long distance charges would "negate" the Commission's ability to safeguard valid Federal interests -- preserving subscribers' access to emergency services and interstate long distance service. According to

---

48/ *Id.* § 254(b)(3) (Supp. III 1997).

49/ *See* Amendment of the Commission's Rules and Policies to Increase Subscribership and Usage of the Public Switched Network, *Notice of Proposed Rulemaking*, 10 FCC Rcd 13003, 13010, ¶ 32 (1995).

50/ The answer to the "unbundling" question

> depends on whether in disconnecting a customer's local service for nonpayment of his interexchange bill, a [local exchange carrier] must also disconnect his interstate service. If it must do so, the local disconnection falls within the FCC's regulatory jurisdiction because it would be impossible to separate the interstate and intrastate components of [service disconnection for nonpayment]."

Maryland PSC, 909 F.2d at 1516.

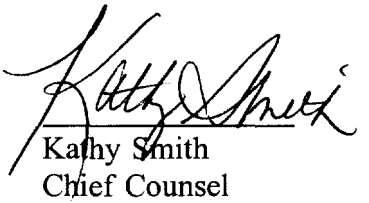
the standard employed by the *TOPUC* court, the Commission could impose a no disconnect obligation to prevent such a result.[51/]

51/ The foregoing analysis does not mean, of course, that the Commission could bar State commissions from disconnecting local service for any reason. One distinguishing feature of service disconnection for nonpayment of interstate charges is that it results from a subscriber's actions or inactions with respect to a Federally-regulated service. In contrast, although disconnection of local service for failure to pay *intrastate* charges incidentally prevents a customer from making and receiving interstate calls, the cause for disconnections relate entirely to the customer's conduct with respect to services that are wholly outside the Commission's jurisdiction. The Federal interest in forestalling State action in the latter case is less strong and the argument for Federal preemption is less convincing. *Cf. id.*, 909 F.2d at 1515 n.6 ("FCC cannot regulate (let alone preempt state regulation of) any service that does not fall within its Title II jurisdiction over common carrier services or its Title I jurisdiction over matters 'incidental' to communications by wire. Many of the reasons for local cutoffs do not even arguably fall within this jurisdiction grant. Other reasons will either not bear upon federal policies or not clash with those policies, and FCC preemption will accordingly not be justified.").

IV. CONCLUSION

For the foregoing reasons, NTIA respectfully requests that the Commission adopt the recommendations set forth herein.

Respectfully submitted,



Gregory L. Rohde
Assistant Secretary for
Communications & Information

Kathy Smith
Chief Counsel

Kelly Levy
Associate Administrator
Tim Sloan
Office of Policy Analysis
and Development

Milton Brown
Deputy Chief Counsel

National Telecommunications
and Information Administration

U.S. Department of Commerce
Room 4713
14th Street and Constitution Ave., N.W.
Washington, D.C. 20230
(202) 482-1816

April 14, 2000